Supreme Court, U.S.
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In the

Supreme Court of the United States

ALTON B. HORNBACK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

ALTON B. HORNBACK
Petitioner Pro Se

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QUESTIONS PRESENTED

1. Whether the United States Government abused its power of eminent domain by allegedly classifying privately developed intellectual property at the level of SECRET pursuant to a national security Executive Order, thereby depriving its owner of all use of that property over an extended period of time?

2. Whether the Ninth Circuit improperly held that the taking of Petitioner's intellectual property effected by Respondent over a 12-year period was an "intentional" tort, and therefore, the asserted tortious temporary takings claim was barred by statute?

3. Whether, in this case, the Ninth Circuit rendered a decision "without any articulable legal justification," which conflicts with a relevant decision of this Court, by holding that the temporary taking was an "intentional" tort?

4. Whether the Ninth Circuit contradicted itself by affirming District Court's construction of the asserted tortious temporary takings claim as a Fifth Amendment takings claim and thus barred by *res judicata*, after having held that the taking upon which the tortious temporary takings claim was based, was an "intentional" tort and thus barred by statute?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner- Alton B. Hornback
Respondent- United States of America

Petitioner is an individual with no corporate disclosures.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

JUDGMENT 1

JURISDICTION 1

STATUTES AND REGULATIONS 1

STATEMENT OF THE CASE 4

1. The Proceedings Below 4
2. Statement of the Facts 5
3. Basis of Jurisdiction in Court of First Instance . . 6

ARGUMENT FOR ALLOWANCE OF THE WRIT . . 7

1. Abuse of the Power of Eminent Domain 7
2. Temporary Taking NOT an "Intentional" Tort . 8
3. Finding of "Intentional" Tort Unsupported 9
4. Fifth Amendment Taking is NOT a Tort 9

CONCLUSION 11

APPENDIX 1a

Appendix A- 7/28/05 Order Denying Petition for Rehearing En Banc 1a

Appendix B- Memorandum Affirming Dismissal of Case 3a

Appendix C- Order Denying Motion for Reconsideration 6a

Appendix D- Order Dismissing Case No. 04-CV-0339 WQH 12a

Appendix E- ISM (Excerpts) 32a

Appendix F- Complaint (Page 1) Case No. 04-CV-0339 WQH 42a

Appendix G- Secrecy Order 44a

Appendix H- Notice of Allowability 47a

Appendix I- Rescinding Order 48a

Appendix J- Patent No. 6, 079, 666 (Page 1) 49a

TABLE OF AUTHORITIES

STATUTES

28 U.S.C. 1254(1) 1
28 U.S.C. 1346(b), 2674 . . . . . *passim*
28 U.S.C. 2680(h) 5
35 U.S.C. 181-188 . . . . . *passim*

CASE LAW

First English Evangelical Lutheran Church of Glendale v. Los Angeles County, 482 U.S. 305 (1987) 8, 9

OTHER AUTHORITIES

Executive Order 12356 . . . . . *passim*
Fifth Amendment to U.S. Constitution . . . . . *passim*
Industrial Security Manual for Safeguarding Classified Information (ISM) . . . . . *passim*

PETITION FOR WRIT OF CERTIORARI

Petitioner Alton B. Hornback, *pro se*, respectfully petitions for a *writ of certiorari* to review the judgment of the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit").

JUDGMENT BELOW

The judgment of the Ninth Circuit is set forth in a 2-page unpublished MEMORANDUM denoted Appendix B (3a).[1] The ORDER denying rehearing and rehearing en banc is denoted APPENDIX A (1a).

JURISDICTION

Judgment of the Ninth Circuit was entered 13 April 2005, and the ORDER denying rehearing and rehearing en banc issued on 28 July 2005. The jurisdiction of this Court is invoked, pursuant to 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

(a) Federal Tort Claims Act (28 U.S.C. 1346(b), 2647)

This is the statute under which COMPLAINT was filed.

(b) Invention secrecy Act of 1952 (35 U.S.C. 181-188)

Section 181 of this Act provides in pertinent part:

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[1] Xa denotes the page number in the attached APPENDIX.

> If ... the publication or disclosure of the invention by granting of a patent therefor would be detrimental to the national security ... the Commissioner shall order that the invention be kept secret and shall withhold the grant of a patent for such period as the national interest requires, and notify the applicant thereof.

(c) Executive Order 12356 of 1982

Sections 6.1(b) and (c) define national security information:

> "Information" means any information or material, regardless of its physical form or characteristics, that is owned by, produced by or for, or is under the control of the United States Government.
>
> "National security information" means information that has been determined pursuant to this Order or any predecessor order to require protection against unauthorized disclosure and that is so designated.

Section 1.1(a)(2) defines "SECRET" as:

> "Secret" shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause serious damage to the national security.

(d) Implementing Directive for Executive Order 12356

The FOREWORD (32a) of the January 1991 edition of the "Industrial Security Manual for Safeguarding Classified Information" (ISM), the implementing directive for Executive Order 12356, identifies those entities subject to its provisions:

The provisions of this Manual apply to all industrial, educational, commercial and other organizations and entities that have executed a DoD Security Agreement (DD Form 441) or a DoD Transportation Security Agreement (DIS Form 1149) with the Department of Defense.

Section 5-304 (35a) specifies the storage requirements:

SECRET STORAGE. SECRET material shall be stored in an approved security container or vault authorized for the storage of TOP SECRET without supplemental controls, or in a security cabinet or strongroom as follows:

a. A safe, steel file cabinet, or safe-type steel file container which has an automatic unit locking mechanism and an approved built-in combination lock with supplemental controls.

Section 5-513 (36a) defines disclosure requirements:

Contractors may disclose classified information during visits provided the visit is necessary for a government purpose; the parties involved possess the appropriate clearance and have a need-to-know for the classified information.

Section 4-105 (39a-40a) addresses privately developed information:

It should be noted, however, that E.O. 12356 prohibits a User Agency from classifying information over which the Government has no jurisdiction. The proposal or other material submitted may not be

> classified by a User Agency Unless: (i) it incorporates classified information to which the contractor was given prior access, or (ii) the Government first acquires a proprietary interest in the information.

STATEMENT OF THE CASE

1. The Proceedings Below

On 19 February 2004, Petitioner filed a COMPLAINT in the United States District Court, Southern District of California, titled "COMPLAINT FOR DAMAGES PURSUANT TO THE FEDERAL TORT CLAIMS ACT (28 U.S.C.A. 1346(b), 2674)". The cause of action as set forth in the COMPLAINT at 1 (42a-43a) reads:

> (1) the theft, or tortious "temporary" taking, of all use by Plaintiff, of his intellectual property over a 12-year period; and
>
> (2) for other tortious acts committed during the course of that taking, which include fraud, conspiracy to defraud, perjury, and the suppression of evidence of those acts.

Only the tortious "temporary" takings claim will be addressed here.

District Court dismissed the COMPLAINT on the ground that "Plaintiff's first claim [was] for a Fifth Amendment taking of his intellectual property" and was, therefore, "barred by the doctrine of res judicata". (26a). Upon reconsideration the Court held (8a):

> Plaintiff alleges that Defendant committed several acts constituting fraud during the pendency of the secrecy order on Plaintiff's patent application. Therefore, to the extent Plaintiff is alleging a tortious taking those allegations fall squarely within the prohibitions of 28 U.S.C. 2680(h). Therefore, Plaintiff's tortious takings claims (sic) fail.

The Ninth Circuit affirmed the decision of District Court by holding that the taking was an "intentional" tort. (4a).

2. Statement of the Facts

On 25 April 1986 Petitioner filed with the Patent and Trademark Office (PTO), a patent application for an invention titled "Real-Time Boresight Error Slope Sensor". That SENSOR can: (i) maintain missile stability in an ABM missile such as the Advanced Patriot (PAC-3), operating in the altitude/velocity regime encountered in a ballistic missile intercept, by suppressing oscillations in a parasitic loop from body motion to apparent target motion and back through the guidance gain to body motion; (ii) permit wide bandwidth HARM type seekers to be used against moving targets, including stealth aircraft; and (iii) improve the cost-effectiveness of all missiles which use a terminal homing seeker.

On 24 August 1987, the PTO imposed a Secrecy Order on that application which stated that the patent application was "to be protected at the Classification Level of Secret" (44a) and that:

> you are ordered to keep the subject matter secret (as required by 35 U.S.C. 181) and you are further ordered NOT TO PUBLISH OR DISCLOSE the

> subject matter to any person except as specifically authorized herein.

That Secrecy Order further stated (45a):

> The subject matter of the above-identified application has been determined to be encompassed by E.O. 10865, entitled "Safeguarding Classified Information Within Industry" or E.O. 12356, entitled "National Security Information" and thus is subject to the "Industrial Security Manual for Safeguarding Classified Information".

On 17 September 1987 the PTO issued a "NOTICE OF ALLOWABILITY" (47a) which states: "in view of the secrecy order issued August 24 1987, under 35 U.S.C. (1952) 181, this application will be withheld from issue during such period as the national interest requires". That 1987 Secrecy Order was rescinded on 21 April 1999. (48a).

On 27 June 2000, Patent No. 6,079,666 (Page 1, 49a) issued in Petitioner's name.

3. Basis of Jurisdiction in the Court of First Instance

Petitioner is now, and at all times referenced herein was, a resident of San Diego, California, which is within the geographical jurisdiction of The United States District Court Southern District of California.

Subject matter exclusive jurisdiction of the underlying cause of action in that Court is set forth in 28 U.S.C. 1346(b).